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No. 639

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

VOLASCO PRODUCTS COMPANY and
VOLUNTEER ASPHALT COMPANY,
Petitioners,

vs.

LLOYD A. FRY ROOFING COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, LLOYD A. FRY ROOFING COMPANY, respectfully files its brief in opposition to the petition for writ of certiorari and prays that said petition be denied because, as shall hereinafter be shown, there is no reason to grant said writ.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 308 F. 2d 383. A copy of the opinion is attached to the Appendix to the Petition at pages 1a-24a. No opinion was issued by the District Court.

JURISDICTION.

The jurisdictional requisites are set forth in the Petition. However, Respondent maintains that Petitioners have totally failed to establish any ground for this Court to express its sound judicial discretion to review the proceedings below on writ of certiorari.

QUESTIONS PRESENTED.

The prolix questions appearing under the heading "Questions Presented" in the Petition are misleading, misstate the facts, assume fact not established in the record, are manifestly rhetorical, and are unduly argumentative.[1] Respondent, therefore, counterstates these questions more accurately as follows:

1. Whether the Court of Appeals is correct in setting aside a jury verdict based on evidence of alleged damages which is "speculative, remote and uncertain"?

2. Whether the Court of Appeals is correct in setting aside a jury verdict where the Trial Court permitted recovery of duplicative damages for one injury?

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[1] Typical instances referred to are as follows: The statement in Question 1 that the projections were made upon "approved accounting and statistical methods"; the statement in Question 3 to the effect that conspiracy was "admitted"; the statement in Question 4 that Petitioner Volasco was "prevented" by Respondent from manufacturing roll roofing and shingles (the uncontroverted fact is that it elected not to acquire available machinery necessary to the manufacture of such products); the statements in Question 6 that (a) Respondent engaged in the practice of "conditioning the market" in the area of a plant Respondent was negotiating to purchase, (b) Respondent initiated all but three of the fourteen price changes, (c) Respondent initiated all five price increases, (d) Respondent's prices resulted in a manufacturer being forced out of the relevant area, (e) Respondent made no adequate objection to the Trial Court's handling of the monopolization issue.

3. Whether the Court of Appeals is correct in setting aside a jury verdict in an antitrust action where the Trial Court permitted the jury to award damages for alleged loss of profits on distinct and independent products as to which Petitioner neither alleged nor proved any act by the Respondent in violation of the antitrust laws?

4. Whether the Court of Appeals is correct in affirming the Trial Court's holding that Petitioner could not recover for alleged loss of profits as to products it did not manufacture simply because it elected not to purchase the necessary and readily available machinery?

5. Whether the Court of Appeals is correct in affirming the Trial Court's ruling that an approximation of damages based on a hypothetical "mature year" period to occur sometime in the unspecified future is too uncertain to be admissible?

6. Whether the Court of Appeals is correct in holding that the Trial Court erred in submitting to the jury the issue as to whether defendant, one of fifteen manufacturers selling asphalt-saturated felt in the relevant market, *alone* monopolized trade in that product where the record is totally devoid of evidence as to Respondent's sales, market position, the market positions or sales of any of its competitors, Respondent's alleged ability to control prices or competition, or any other economic factors necessary for such a determination?

7. Whether the Court of Appeals is correct in holding that the law of the State of Tennessee, in conflict with established Federal Law, is inapplicable to a cause of action under the federal antitrust laws?

8. Whether the Court of Appeals is correct in holding that a supplier of raw materials to a manufacturer of a

finished product (allegedly the victim of an antitrust violation) is too remote to recover damages under the antitrust laws?

STATUTES INVOLVED.

The statutes involved are sections 1 and 2 of the Sherman Act (15 U.S.C., §§1, 2), Sections 2(a) and (b) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C., §13(a) and (b), and Sections 4 of the Clayton Act (15 U.S.C., §15), all of which are set forth in the Appendix to the Petition at pages 27a-29a.

STATEMENT OF THE CASE.

Proceeding Below

Petitioners, Volunteer Asphalt Company (sometimes hereinafter referred to as Volunteer) and Volasco Asphalt Company (sometimes hereinafter referred to as Volasco) brought an action in the District Court of the United States for the Eastern District of Tennessee, Northern Division, seeking treble damages from Respondent Lloyd A. Fry Roofing Company (sometimes hereinafter referred to as Fry) for alleged violations by Fry of Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton Act, as amended.

The complaint alleges and the answer denies that Respondent *alone* monopolized, or attempted to monopolize, or conspired with ten other manufacturers of asphalt roofing products to fix prices and monopolize trade in such products in the area within a 200 mile radius of Knoxville, Tennessee, and that Respondent discriminated geographically in the price of asphalt-saturated felt, by charging lower prices in such area where Petitioners did business than elsewhere.

Trial was had before a jury. At the close of the Petitioners' case, Respondent moved for, and the Trial Court granted, a directed verdict against Petitioner Volunteer on the ground that as a supplier of a raw material to Volasco (the manufacturer of the only finished product against which any antitrust violation was alleged), it was too remote to recover. (R. 1577-80)

At the close of all the evidence, Respondent moved specifically to take the issue that defendant *alone* monopolized trade from the jury.[2] (R. 2185) The motion was denied, and the trial court submitted the following issues to the jury: (1) conspiracy to fix prices and monopolize; (2) monopolization by defendant alone; (3) attempted monopolization by defendant alone; and (4) geographical price discrimination. The jury returned a general verdict of $100,000, the Trial Court trebled the verdict and fixed counsel fee at $60,000, resulting in a judgment of $360,000, and entered an injunction. Post trial motions to set aside the verdict and judgment and to enter judgment notwithstanding the verdict and for a new trial were filed and overruled.[3] Respondent perfected its appeal to the Court of Appeals for the Sixth Circuit. Petitioner Volasco filed what it termed a "conditional appeal" and Petitioner Volasco filed a separate appeal.

The Court of Appeals affirmed the Trial Court with respect to the issues raised by the "conditional appeal" of Volasco and the appeal of Volunteer. It also reversed the verdict and judgment against Respondent and ordered a new trial, holding that the Trial Court erred in submitting to the jury the issue of whether defendant *alone* monopo-

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[2] Similar motions were made with respect to other issues.

[3] Respondent assigned 243 errors of the Trial Court in its motion for a new trial. (R. 2481-2522)

lized, that it erred in admitting evidence with respect to damages which was fallacious, speculative and remote, that it erred in permitting the jury to allow duplicative damages for one injury, that it erred in permitting the jury to award damages for alleged loss of profits on distinct and independent products against which no antitrust violations were alleged or proved, and, with respect to certain other errors assigned by the Respondent, said: "Other matters relating to the conduct of the trial and the admission or rejection of evidence may not arise upon a new trial and we find it unnecessary to now consider them."[4]

Petitioners

Petitioners are two separate and distinct corporations located in Knoxville, Tennessee, having the same shareholders and officers. (R. 560-1) Volasco commenced doing business about October 1955, and Volunteer commenced business the preceding year.[5] (Ex. 163; R. 2330; R. 140)

The Product

The only roofing product manufactured by Volasco during the relevant period and the only product as to which violation of law is alleged is asphalt-saturated felt. (Complaint) Asphalt-saturated felt, frequently referred to simply as felt, resembles tar paper. It is comprised of two

[4] The discussion by the Court of Appeals as to conspiracy was not necessary to that court's holdings. The errors raised by Respondent in the Court of Appeals under the Robinson-Patman Act and attempt to monopolize issues were not reached by that Court. Accordingly, Respondent makes no answer to Petitioners' characterization of these aspects of the case, except to note that Petitioners' presentation is inaccurate and unsupported by the record.

[5] Throughout this Brief, except in Part V of the Argument which pertains to Volunteer, the word Petitioner refers to Volasco.

ingredients, absorbent dry felt and asphalt saturant. The felt is saturated with asphalt. Volasco purchased its asphalt saturant from Volunteer. (R. 91-94)

Asphalt-saturated felt is used on roofs either under shingles without asphalt or in a "built up roof" consisting of several layers of asphalt-saturated felt, each ply covered with mopping asphalt. It is also used extensively for general non-roofing purposes. (R. 644-5) The asphalt-saturated felt produced by one manuacturer is undistinguishable from that produced by other manufacturers. Asphalt-saturated felt is, therefore, a fungible product. (R. 438; 1695)

Asphalt is used with felt in constructing built up roofs. (R. 645) It is used extensively without felt for several purposes including, for example, waterproofing of concrete structures. (R. 1935; 1284) Some customers of manufacturers purchase both products, others one or the other. (R. 1231)

Respondent

Respondent is a multiplant company which manufactures and sells a full line of asphalt roofing products, including asphalt-saturated felt, as well as many types of shingles and roll roofing not manufactured by either Petitioner. (R. 1921-4)

Competitors

Among Fry's competitors are such publicly held multiplant corporations as Johns-Manville Corporation, Certain-teed Products Corporation, The Flintkote Company, Allied Chemical Corporation (Barrett Brand), The Ruberoid Company, United States Gypsum Company and The Celotex Company, as well as the Philip Carey Manufacturing Company, Bird & Son and Logan-Long Com-

pany. (R. 556; 610) All these ten firms manufacture and sell a full line of asphalt roofing products. Most of them also manufacture and sell a variety of other building products not sold by Fry. (R. 1921-8) Most of them sell, as does Fry, throughout the United States. All, except perhaps United States Gypsum, have sold asphalt-saturated felt in competition with the Volasco brand in the relevant market area, *i.e.*, the area approximately 200 miles in radius around Knoxville, Tennessee. (R. 601-12; 1930-32; 1839-43; 1693)

In addition to Fry and the above named manufacturers, at least five other firms also compete with Volasco in the sale of asphalt-saturated felt, several with a policy of selling at 5% below published prices of major manufacturers. (R. 609-10; 1930-32; 1686; 1693) Only one company claimed to have withdrawn from the market. (R. 1476) However, uncontroverted, documentary evidence reveals sales by this company long after its alleged withdrawal. (R. 1824) In any event, it did not attribute its supposed withdrawal to Fry. (R. 1476)

Economic Facts

One of the several issues submitted to the jury was whether Respondent *alone* monopolized trade in asphalt-saturated felt within a 200 mile radius of Knoxville. However, the record is barren of the economic information concerning this market which would be necessary for such a determination. It does not reveal Respondent's market share or the market share of any competitor selling in this area. It does not reveal the sales of any competitor selling in this area. It does reveal that the sales of felt of the four Fry plants serving the relevant area decreased by approximately 13% from 1955 to 1958, as

compared to a drop nationally by Fry of 11.3% during the same period.[6] (Exhs. 146-149, 174-176, 179; R. 157)

The record also reveals that in 1955 Respondent's share of the national market for asphalt-saturated felt was 13%, and that in 1958 its share declined to 12½%. (Exhs. 146-149, 174-176; R. 157) While it does not show the national share of any of Fry's competitors individually, it does show that the three largest competitors of Fry share 30% of the national market and that the next four largest competitors account for approximately 25% of that market. (R. 1582; 157)

Between the time Volasco entered the roofing business and the date of the filing of the Complaint, Respondent changed its prices in the relevant area on 16 occasions. Insofar as those price changes affected Knoxville, for example, they revealed that on six occasions Respondent raised its price, on seven occasions it reduced its price to meet competition and on three occasions the price in Knoxville was unaffected. These changes were intermittent increases and decreases being interpolated between one and the other, with the general trend of prices being downward. As late as January 27, 1958 (less than three months before the filing of the Complaint herein), Respondent attempted to raise its prices but was required to reduce them retroactively on February 14, 1958, in order to meet competition. (Petition at p. 25; Exhs. 54, 55-58, 117, 118, 433; R. 1999-2004)

Alleged Damages

The so-called damage period was determined by the Trial Court to be the 2½ year period between October

[6] The four plants serving the relevant area also served a broader area. Nevertheless, these figures reflect a decrease in sales and militate against any inference of increased market share or monopolization.

1955 when Volasco started its business and April 1958 when suit was filed. Before the start of the trial, the parties were so advised. (R. 51-2)

A. The "Mature Year"

Volasco, through its president, Mr. Krug, ignored these years and attempted to substitute for alleged loss of profits during those years anticipated profits exceeding $400,000 ($163,960 per year for 2½ years) which he claimed his company could earn on the sale of felt, asphalt and coatings during two and one-half of its "mature years" which he said would occur at some unspecified hypothetical period after 1960. (R. 965-81)

B. Shingles and Roll Roofing

Prior to its placing the $400,000 figure before the jury, Volasco sought damages of over $750,000[1] arrived at by the same "mature year" theory. (R. 572) This included hypothetical loss of profits on shingles and roll roofing, as well as hypothetical profits on felt and asphalt, even though Volasco did not have the machinery necessary to manufacture either shingles or roll roofing. (R. 512) Such machinery, which was readily available on the market, would have required an expenditure of $60,000. (R. 508-10) Volasco unilaterally and voluntarily chose not to make this expenditure. (R. 568-9)

The Trial Court first told the jury that "mature year" evidence was competent (R. 893-5); later, outside the presence of the jury, the Trial Court told counsel that to permit the jury to consider this evidence (which had already been done) as evidence of loss of profits would be reversible error, but it had told the jury it could consider

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[1] This figure was placed in the record outside the presence of the jury.

this evidence in connection with Volasco's claim for injury to its business or property. (R. 964, 967, 996-7) Ultimately the Trial Court ruled that Volasco could not substitute hypothetical profits in abstract hypothetical years *in futuro* for the damages it claimed to have suffered during the years in question, and so advised the jury. (R. 1063-5) The Trial Court also ruled that Volasco could not recover hypothetical profits on products it could not manufacture where it had simply decided not to purchase the necessary and readily available machinery. (R. 2187, 2216-17)

The Trial Court's ultimate ruling on the "mature year" theory and evidence and its ruling on the right of Volasco to recover for alleged loss of profits on anticipated sales of shingles and roll roofing which it could not manufacture were the subject of Volasco's "conditional appeal" in which the Court of Appeals affirmed the Trial Court.*

C. Asphalt-Saturated Felt, Asphalt and Coatings

After the Trial Court ruled against Volasco's claim for alleged loss of profits on shingles and roll roofing, Volasco sought damages for alleged loss of profits on sales and anticipated sales of felt, the only product it manufactured against which any antitrust violation was alleged. On the theory that had it sold more felt it would have sold more asphalt and coatings, it also claimed and over objection was permitted to introduce evidence of alleged damages for loss of profits on anticipated sales of these products. (R. 96-7, 1091) No claim of antitrust violation was made as to either of these products.

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* Outside the presence of the jury, and before any "mature year" evidence was received, Respondent called the Trial Court's attention to its impropriety. The Trial Court's original admission of this evidence and the confusion resulting therefrom which permeates the entire record was one of the errors relied upon by Respondent which the Court of Appeals did not reach.

Volasco was organized in 1955 with a stockholders investment of $60,000. (Ex. 158) In addition to a claim for the lost profits on felt and asphalt, it sought damages of an additional $447,500, offering the testimony of Mr. Krug that had Volasco received the "lost profits" it sought from Respondent, its business would have been worth $500,000 in April 1958, but because it earned only $16,413 during its 2½ year existence, it was worth only $52,500. (R. 1572)

The Trial Court rejected this testimony, but permitted Mr. Krug to testify that the shareholders investment in April 1958 was $188,741 (actually stockholders investment plus borrowed capital and accounts payable) but that solely because it only made a profit of $16,413 during the "damage period" the business was then only worth $148,840 and that Volasco was therefore entitled to additional damages of $39,901.13. (R. 1082-84; Ex. 158)

The ruling of the Trial Court in excluding the claim for $447,500 was the subject of Volasco's "conditional appeal" and the Trial Court's ruling was affirmed. On Respondent's appeal, the Court of Appeals held that while in a proper case damages are not to be limited to loss of profits, that under the proof presented in this case, the jury was permitted to award a double recovery for the same injury.

The Court of Appeals also held that it was error to permit damages for alleged loss of profits on asphalt and coatings, distinct and independent products which were not involved in the alleged violation. It also held the evidence offered and received with respect to projected sales and profits was conjectural and speculative.

The evidence to which the Court of Appeals directed itself is set forth and discussed in the next section of this Brief and hence will not be detailed here.

ARGUMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

The varied issues in the case at bar are uniquely narrow and are limited to the unparalleled manner in which this case was tried. The simple fact is that Petitioners, in their attempt to recover unreasonable damages, resorted to fanciful theories which are based upon neither reason nor law. The Trial Court, through its commission of manifold error, permitted the trial of this case to result in improper and distorted conclusions as to liability and damages. On appeal to the Court of Appeals, many of these errors were explicitly ordered corrected, and the case was ordered to be retried in a manner consistent with the opinion of that Court.

Prior to this retrial, however, Petitioners seek review in this Court by writ of certiorari. The essential thrust of the Petition is not to demonstrate grounds for granting the writ in accordance with the criteria set forth in Rule 19 of this Court, but is, in substance, to re-argue this case on its merits in the same fashion as was done in the Court of Appeals. The asserted denial to Petitioners by the Court of Appeals of the right to a trial by jury is frivolous, because the Court below merely held that incompetent evidence may not be placed before a jury. The asserted conflict between the decision below and the decisions of other courts is likewise frivolous, because a sound analysis of the latter decisions discloses them to be either in accord with the decision below or far removed from any point of law contained in this case. That no unsettled important question of Federal law is presented for decision by this Court is self evident from the face of the Petition itself.

Since Petitioners have basically re-argued this case on its merits and have distorted case authority in their attempt to show supposed grounds for granting certiorari, Respondent has been compelled to compose each section of this Brief to demonstrate the patent correctness of the decision below as well as the clear absence of any ground for certiorari jurisdiction.

The arguments raised in the Petition will be discussed *in seriatim*, and it will be shown that on questions of the proper method for measuring damages, the speculative nature of the evidence relating to damages, monopolization, standing to sue under the antitrust laws, and the applicability of Federal rather than State law to a case tried under the Federal antitrust laws, the decision and holdings of the Court of Appeals are sound, just and based upon well established and uncontestable principles of law.

I.

THE COURT OF APPEALS' REJECTION OF PETITIONER VOLASCO'S PROOF OF DAMAGES AS SPECULATIVE AND DUPLICATIVE WAS CORRECT AND IN ACCORD WITH ALL RELEVANT PRECEDENTS.

A. The Speculative Nature of the Evidence.

In its decision the Court of Appeals specifically noted that a plaintiff in an antitrust action is not required to prove damages with absolute mathematical accuracy but that the evidence must furnish some approximation of the actual damages so that they may be determined with reasonable certainty. It rejected Petitioner's evidence because the Petitioner had indulged in theories that resulted in proof which was speculative, remote and uncertain.

This decision does not, as Petitioner contends, impinge upon or conflict with the decisions of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Company* v. *The Patterson Paper Parchment Company*, 282 U.S. 555 (1931); *Eastman Kodak Co.* v. *Southern Photo Materials Company*, 273 U.S. 359 (1927); or *William H. Rankin Co.* v. *Associated Bill Posters of United States and Canada*, 42 F. 2d 152 (C.C.A. 2, 1930).

The evidence in the case at bar bears no resemblance to the evidence in the cases cited. In each of these cases, the jury was given proven facts and a reasonable basis upon which to assess damages, whereas here the Trial Court permitted the jury to assess damages based upon unreasonable, speculative projections which were in turn predicated upon unwarranted assumptions.

Petitioner here seeks mechanically to apply the language of the cited cases to the effect that a plaintiff in an antitrust action need not prove damages with mathematical precision as a justification for the admission of incompetent and speculative evidence by characterizing it as evidence presented in accordance with sound accounting principles and based upon market studies.

In his effort to present to the jury an inordinately high claim for lost profits, Mr. Krug devised an ingenious theory. He first assumed that sales of felt and sales of asphalt moved in a fixed ratio, one to the other (an assumption hereinafter discussed in detail). Mr. Krug then testified that Volasco sold 21,287 drums of asphalt during its first fiscal year ended April 30, 1956 and 52,598 drums in the following year. Thus, the second year's sales of asphalt were 247% of the first year's sales. (R. 1088-89) He theorized that inasmuch as Volasco sold 78,914 rolls of felt in its fiscal year ended April 30,

1957, it should have sold 247% of that volume, or 195,000 rolls, in its next fiscal year. (R. 1088-89; Ex. 197)

But he did not even stop there, for he was not satisfied with the 78,914 roll figure for the first year, although he had used it as base for projecting into the next year. So, he drew a graph (Ex. 197), a copy of which is attached hereto in the Appendix at page 1a, with September 1955 as the zero point, the number of rolls of felt running vertically along the graph, and the time running horizontally. Having computed that 195,000 rolls was 247% of 78,914 rolls, he plotted 195,000 rolls at April 1958 (Volasco actually sold 61,271 rolls that year) and projected a straight line from that point *back* to the zero point of September 1955. That line crossed April 1957 at 120,000 rolls of felt, whereas during that fiscal year Volasco had actually sold 78,914 rolls and his claimed sales for 1958 were projected on that figure. By this theory, Mr. Krug claimed that in these two years, Volasco should have sold 310,000 rolls of felt, whereas actually it had sold about 140,000 rolls. He claimed damages for the difference of 170,000 rolls. (R. 1089; Exhs. 195-8)

The theory of projecting anticipated sales in one product on the basis of experience in another product is inherently speculative. The method used by Mr. Krug defies reason. Moreover, there is no factual foundation in the record for the essential assumption underlying Mr. Krug's approach, that sales of felt move in a specified ratio with sales of mopping asphalt.

The uncontroverted evidence including the testimony of Volasco's president, Mr. Krug, revealed many and extensive uses for felt unrelated to its use with asphalt. (R. 644, 653, 654, 759, 1285, 1293) On the other hand, there are several grades of asphalt, some of which are never used with felt (R. 1284, 1985), and while some

customers buy both asphalt and felt, others buy only asphalt and still others buy only felt (R. 1231, 1293). The observation, at page 42 of the Petition, that *ultimate consumers* of felt also purchase asphalt does not prove that *manufacturers* sell the two products in a fixed ratio. In fact, many *distributors*, if they purchase both products, often have different sources of supply for each. (R. 1774, 1819, 1846, 1957)

The only basis advanced by Mr. Krug for his assumption that asphalt and felt moved in a fixed ratio was that he alleged he discovered this from a study of *some of his accounts* for an undesignated but necessarily brief period. (R. 1318) But it is obvious that any seller dealing in two products for any length of time—from a one-day period to infinity—would find from a study of its sales that the two products sold in some given ratio. Such ratio proves nothing. The study of *all* accounts of a new company, such as Volasco, would be meaningless, and a study of some of its accounts borders on the ridiculous. The method used in selecting the accounts and the period involved is not disclosed by the record. In any event, Mr. Krug must have been quite selective in the accounts he studied, for the chart of Volasco's complete sales statistics (Exhs. 163 and 164) shows that the two products, asphalt and felt, did not move in any fixed ratio. Exhibits 163 and 164 *are* in evidence; Mr. Krug's study *is not* in evidence (See R. 1280-1283).

These exhibits showing sales of Volasco's various products reveal that its sales of asphalt rose while its felt sales were declining. This fact was specifically noted by the Trial Court (R. 689) and in commenting upon Petitioner's theory remarked that it did not believe it was sound. But the Trial Court permitted the jury to consider it.

Another fallacy in Mr. Krug's projection lay in the special circumstances under which Volasco's second year's sales of asphalt were 247% of the first year's sales. The first, or base year, was May 1, 1955 to April 30, 1956. (R. 1088-9). Mr. Krug's statistics with reference to asphalt sales include *all types of asphalts sold in drums* including dead level asphalt, a product Volasco did *not sell* during the first seven months of its base year. (R. 1215-6) Its sales of this type asphalt in its second year were understandably almost four times as much as its sales during the base year. (Ex. 156) These statistics also included a grade of asphalt sold to the Wilbert Vault Companies which neither purchased nor used felt. (R. 1284-5) Significantly, Volasco sold this type asphalt and this customer for the first time during the *last* month of the base year when Wilbert purchased 120 drums as compared to its purchases of over 11,000 drums in the second year. The sales to Wilbert represented over 20% of Volasco's total asphalt sales during this second year and more than 33% of its increased sales of asphalt in the second year over the base year. (Ex. 156)

Further, in April 1955, just before the base year commenced, and again in June 1955, just at the beginning of the base year, and still again in May 1956, just after the end of the base year, Mr. Krug responded to inquiries from prospective purchasers of asphalt by advising them that Volasco was still trying to work out a source from which to purchase drums and that because of a shortage of raw materials and the demand upon its refinery, it was unable to take on additional asphalt business. (Exhs. 224, 211, 205) So, for the entire base year, Volasco did not have facilities sufficient to fill its demands.[9]

[9] On the witness stand, Mr. Krug testified that he was not telling the truth in these letters. (R. 1221, 1228)

Obviously, therefore, Volasco's first year of operation revealed unrealistically low sales of asphalt because the operation was just getting underway. Thus, the fact that the second year's sales of asphalt were 247% of the first year's sales was without significance as to forecasts of *future asphalt sales growth.* Certainly it was all the more improper to apply the 247% figure to the sale of felt and in an entirely different year.

Mr. Krug's theory was defective, too, in that he did not take into account any economic factors. He simply projected Volasco's growth in sales straight upward, with no trajectory, as if Volasco sold in a vacuum. A theory such as Mr. Krug's could be used to make the figures prove anything. Equally speculative was Volasco's attempt to project felt sales by multiplying the average number of rolls sold to each of its customers during the first year, when its prices were below the market and when three customers alone accounted for 25% of its sales, to the number of acounts on its books during the second year. (Ex. 156) This theory assumes that anyone who at any time purchased from Volasco became its permanent customer and would thereafter purchase this average. It ignores completely saturation of demand, market fluctuation and all similar economic factors. The legal insufficiencies of this theory appear in *Clapper* v. *Original Tractor Cab Co.*, 270 F. 2d 616, 630-632 (C.A. 7, 1959), cert. den. 361 U.S. 967 (1960).

The testimony of Mr. Bye, characterized by Petitioner as expert testimony based upon market studies, was not only speculative and conjectural, but was received without a proper foundation on a subject beyond Mr. Bye's expertise. The narrow limits of his qualifications were stated by the Trial Court, after noting that he was not an expert in the roofing business, "Now you are solely

testifying from an expert accountant standpoint." (R. 1372).

Mr. Bye admitted that he had absolutely no experience in the roofing business, as an auditor or otherwise, and that he did not know whether there was in fact any fixed relationship between the sale of felt in an area and its population and square mileage (R. 1449), but that he had assumed such a relationship.[10] He was permitted to testify that, having found the population and square mileage in the area served by Fry's plant in Morehead City and the population and square mileage of the area served by Volasco's plant in Knoxville to be comparable, Volasco had a potential of 300,000 rolls because Fry's Morehead City plant sold 275,000 rolls of felt in 1957 and 341,000 rolls in 1958. (R. 1385) This is the "market study" referred to by Petitioner. (R. 1445-9)

Even if Mr. Bye could have properly assumed that felt sold in some direct proportion to population and square mileage, the most that such assumption would tend to show is that the *total industry* sales in the two areas should be comparable.[11] The assumed hypothetsis does

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[10] Contrary to the assertion at page 46 of the Petition, Mr. Bye did not in fact base his "conclusion" on studies of residential units and commercial industrial buildup in relation to the sale of felt in the two areas, but admitted that his assumptions were based entirely upon population and square mileage, and further admitted that even these studies were inadequate. (R. 1445-1449)

[11] It was on the basis of just such an assumption that Mr. Krug concluded that Volasco could capture 20% of the 1,601,000 rolls of felt which he assumed were sold in the relevant market area (R. 133, 908), and the inference found on page 36 of the Petition that the United States Commerce Department Facts for Industry contains supporting figures is misleading, because that publication only contains national figures and in no way suggests that felt consumption and population are directly proportional to one another.

not even tend to establish that Volasco's plant, operation, policies, and management and the plant, operation, policies, and management of the Fry Morehead City plant were similar or in any way comparable or that each should sell approximately the same amount of felt. So Mr. Bye's opinion was nothing but a laymen's conclusion drawn from insufficient facts in a gazetteer or census report, the type of testimony which time and again has been rejected by the courts. See *Homewood Theatre, Inc.* v. *Loew's, Inc.*, 110 F. Supp. 398 (D. Minn., 1952), appeal dismissed, 207 F. 2d 263 (C.A. 8, 1953).

Mr. Bye then testified that from an accounting standpoint he could not ascertain from Volasco's sales figures, the number of rolls of felt it could have sold in the year ending April 1958, but he could do so from a statistical standpoint (a meaningless phrase in this situation), and then, over objection, he was permitted to testify that Volasco during 1958 could have sold 195,000 rolls (R. 1388-9) which, as the Court of Appeals noted, happened to be the figure testified to by Mr. Krug. Mr. Bye did not even attempt to relate this figure in any way to the fallacious assumption that felt sales bear some given relation to population and square mileage, but mechanically parrotted Mr. Krug's testimony that after finding a 247% increase in sales of asphalt in 1957 over 1956 he applied this percentage to Volasco's 1957 felt sales and arrived at the 195,000 figure. (R. 1390)

He admitted that he did not know whether there was any fixed relationship between the sale of asphalt and felt but had assumed such relationship existed; he admitted that he did not know whether the base year upon which the percentage was calculated was a proper one or what factors entered into Volasco's sales during the base year as compared to the second year (previously shown

in this argument). Further, he said his opinion was based upon Volasco's having an aggressive sales force (it had one salesman), home office support, good customer service, and other factors about which he admitted he had no knowledge. (R. 1457-9)

Mr. Bye as an accountant knew no more about the subject matter as to which he testified than any layman or juror and it was error to permit him to testify. See *Westinghouse Electric & Mfg. Co.* v. *Denver Tramway Co.*, 3 F. 2d 285 (D. Colo. 1924), aff'd. 23 F. 2d 287 (C.C.A. 8, 1927), cert. den. 278 U.S. 616 (1928). Further, his opinion was based solely upon the assumption of facts neither known to the witness, nor supported by the evidence. See *Sunkist Growers, Inc.* v. *Winckle & Smith Citrus Products Co.*, 284 F. 2d 1 (C.A. 9, 1960).

Moreover, although the witness admitted complete lack of knowledge of the subject upon which he rendered his opinion, he was not even asked a question in hypothetical form. Thus his testimony placed before the jury, as matters of fact, that there is a correlation between the sale of felt and population and square mileage, and that asphalt and felt sell in a fixed ratio, one to the other.

The net effect of the testimony of Messrs. Krug and Bye was to place before the jury "an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." *Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F. 2d 906 (C.A. 2, 1962), cert. den. 369 U.S. 865 (1962), rehearing denied, 370 U.S. 920 (1962), and to permit the jury to determine damages based upon evidence that was speculative and conjectural.

The opinion of the Court of Appeals in rejecting Petitioner's evidence as speculative and conjectural and its

ordering a new trial neither conflicts with the prior opinions of this Court or any Court of Appeals, nor does it deny Petitioner the right to a trial by jury. On the contrary, it assures a fair jury trial for both parties.

B. The Duplicative Nature of the Damages.

Nor does the decision of the Court of Appeals impinge upon or conflict with the decisions in *Story Parchment Co.* v. *Patterson Paper Parchment Company*, 282 U.S. 555 (1931) or *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (C.A. 10, 1959), cert. den. 363 U.S. 843 (1960), both of which are distinguished in the decision below in which the Court of Appeals recognized that a plaintiff in an antitrust suit is not limited to loss of profits but may, in a proper case, recover damages both for loss of profits and injury to its business or property. However, it held that such recovery could not be permitted here because, *on the proof presented*, the claims were duplicative, and held that the Trial Court was in error when, by its instructions, it permitted the jury to allow both.

In the *Story Parchment* case, the plaintiff proved damages for (1) lost profits and (2) the extent to which the value of its property had been diminished because, having been forced out of business, it would be necessary to liquidate its assets. Unlike the plaintiff in *Story Parchment*, Volasco has not been forced out of business, and it was as of the date of the Complaint (as well as the time of the trial) actively engaged in the manufacture of asphalt-saturated felt, utilizing the same plant and equipment which were in operation all during the Complaint period.

The opinion of the court in the *Atlas Building* case merely followed the language of this Court in the *Story*

Parchment case, and approved a trial court's instruction based thereon in the light of the evidence there presented. But, there is nothing in that case indicating that on the evidence there presented any damages awarded would be duplicative. Hence, the *Atlas Building* case is not authority for an award of duplicative damages, and may not be relied upon as such.

In the case at bar, Mr. Krug testified that the investment of Volasco's stockholders as of April 1958 was $188,743.13 (actually this was the stockholders' investment plus borrowed capital and accounts payable) (Ex. 158) and further testified that "*due to the very small earnings* of the company ($16,413), its value was then $148,840." (R. 1081-4) The Petition itself acknowledges that "this reduction in value was due to low earnings caused by defendant's pricing policies." Petition, at p. 28. Thus, the *sole* basis for the reduced value placed upon Volasco's business and property was the absence of those profits which Mr. Krug thought his company should have earned, and which the Trial Court instructed the jury they might award.[12]

In other words, once those "lost profits" were restored by a jury verdict, that fact would, *ipso facto*, restore the alleged loss of value of the business or property by dissolving the *only basis* for the claim. Hence, by permitting the jury to award Volasco the "lost profits" and reduced value of its business predicated solely upon the absence thereof, the Trial Court permitted a double award for the same injury, and the Court of Appeals was correct in holding this to be improper.

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[12] It follows, a fortiori, that Volasco's claim of $447,500 (based upon capitalized value of alleged projected earnings less actual value) is also duplicative in nature, because the only basis for this claim is, once again, alleged lost earnings. (R. 1572)

II.

THE COURT OF APPEALS FOLLOWED ESTABLISHED PRECEDENTS AND WAS CORRECT IN HOLDING THAT PETITIONER VOLASCO COULD NOT RECOVER FOR PROJECTED LOSS OF PROFITS ON DISTINCT AND INDEPENDENT PRODUCTS AGAINST WHICH NO ANTITRUST VIOLATIONS WERE ALLEGED.

A. The Claim Was Too Remote To Permit A Recovery.

Volasco's claim for "lost profits" on projected sales of asphalt and coatings (R. 1105), products as to which no action by Respondent in violation of the antitrust laws was alleged, was remote and speculative. It claimed that when its felt sales declined it *must have* lost sales of asphalt and coatings because some of its customers buy both products. (R. 1187-8, 1318) Significantly, Volasco made no showing that sales of those products *actually* went down, or that any sales actually were lost (the record (Exhs. 163, 164) showing that, in fact, sales of asphalt and coating went up), or that *even a single customer declined to buy asphalt or coatings from Volasco because such customer did not or would not buy felt from Volasco.* The record reveals the contrary. (Ex. 222) For example, it shows that some customers who ceased purchasing Volasco's felt because they considered it defective, continued to purchase its asphalt (Ex. 223), and that customers, such as Ross Builders whose purchases represented 25% of Petitioner's sales of felt, never purchased any asphalt from it. (Exhs. 156, 163)

In holding that Volasco's claim for lost profits on these products was remote and outside the "target area" of the alleged violation, since these products were not involved in the alleged price manipulations, the Court of Appeals was correct and followed established precedent. In *Frey & Son, Inc.* v. *Welch Grape Juice Co.*, 240 F. 114

(C.C.A. 4, 1917), an antitrust action, plaintiff, a jobber, claimed inability to obtain grape juice from defendant at a price lower than that charged by defendant to retailers. He sought damages not only for loss of profits on lost sales of grape juice *but also for alleged losses incurred on other food stuffs which he claimed he was unable to sell to retailers because retailers preferred to purchase all food products from a single jobber.* The court there held that losses of sales of products other than grape juice were too remote to be the subject of damages.

In the instant case, Volasco's claim for damages on mopping asphalt and roof coatings was exclusively based on the same theory as that urged by the plaintiff, and rejected by the court, in the *Welch* case, *supra*, and was, therefore, properly rejected by the Court of Appeals.

Petitioner asserts that the holding of the Court of Appeals in this respect "does violence" to the holdings of this Court in the cases of *Eastman Kodak Company* v. *Southern Photo Materials Company*, 273 U.S. 359 (1927) and *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555 (1931). Neither of these cases is even remotely applicable to this point of law. In the *Story Parchment* case, damages for only one product were sought. Similarly, in the *Eastman Kodak* case, recovery was sought and allowed only as to that group of photographers supplies which defendant refused to sell to plaintiff, and no recovery was sought for similar supplies purchased by plaintiff from others than the defendant.

In neither cited case was a recovery sought for products against which no antitrust violation was alleged. Consequently, the holding of the Court of Appeals in this respect is not in conflict with any other decision, but is in fact based upon valid precedent.

B. Petitioners' Projection of Damages Was Unreasonable, Conjectural and Speculative.

Further, the method by which Mr. Krug calculated how much additional asphalt he would have sold is nothing short of fantastic. Volasco's sales of asphalt in its fiscal years 1956, 1957 and 1958 were approximately 21,300 drums, 52,500 drums and 59,430 drums, respectively. Although these were formative years of his company, Mr. Krug was not satisfied with this progressive increase in sales. So he drew a graph (Ex. 197), a copy of which is attached hereto in the Appendix at page 1a, on which he plotted Volasco's actual sales in 1956 and 1957, ignoring 1958 sales. Then he connected the points representing volume of sales at the end of 1956 and 1957 and projected that line continuously, without trajectory, so that it crossed the 1958 line at about 87,000 drums as compared to actual sales for that year of 59,430 drums, and claimed damages for the difference. The projection of sales along a straight, steeply inclined line from zero to infinity defies every conceivable principle of economics and reason, and manifestly gives no consideration to saturation of demand, competition, and a host of other essential factors. But his projection of asphalt sales was defective not only because the principle employed was contrary to reason and lacked probative value, it also was defective because 1956, the base year upon which Mr. Krug determined rate of growth of asphalt sales, was its *first* fiscal year, and, as already shown, Volasco sales were substantially lower than its second year's sales for a variety of reasons such as lack of capacity and shortage of raw materials. Therefore, the fact that 1957 sales were 247% of its 1956 sales was meaningless, and projecting the 1956-1957 line into the future in a straight line is, for this additional reason, unreasonable and speculative.

Mr. Krug's treatment of Volasco's claim for lost sales of coatings was even more conclusory, conjectural and speculative than his claims of lost sales of felt and asphalt. With respect to coatings, Mr. Krug did not even make a study of even *some* of his accounts to determine whether there was any correlation between sales of coatings and sales of asphalt. He boldly asserted his claim for damages on coatings in these words:

> "The coatings were arrived at the same as felt in its second full year. At this time, we had one year's experience in that product, and we applied the same factor of growth to that as we applied to felt . . ." (R. 1105)

Petitioner can find no basis to even attempt an argument as to the propriety of this segment of its "proof" so merely brushes it aside with the statement that it is not a large item. (Petition, at p. 37) If fully reflected in the judgment, it amounts to $15,000, 25% of the amount with which Petitioner was founded.

III.

THE COURT OF APPEALS FOLLOWED ESTABLISHED PRECEDENTS AND CORRECTLY HELD THAT PETITIONER COULD NOT RECOVER ALLEGED LOSS OF PROFITS ON PRODUCTS IT DID NOT MANUFACTURE SIMPLY BECAUSE IT ELECTED NOT TO PURCHASE THE NECESSARY AND READILY AVAILABLE MACHINERY.

It is undisputed that the only product which Petitioner Volasco ever manufactured, or was ever equipped to manufacture, was asphalt-saturated felt. Its plant and equipment have never been capable of producing either asphalt shingles or roll roofing, and it would have required the expenditure of about $60,000 to purchase and install the machinery necessary to manufacture those two

products. (R. 508-10) The essence of Petitioner's claim is not that Respondent controlled and thus prevented Petitioner from acquiring the necessary machinery to manufacture these products but that Respondent's pricing practices as to asphalt-saturated felt discouraged Petitioner from purchasing this machinery and thus entering the business of producing shingles and roll roofing, because Mr. Krug assumed that if Volasco entered those businesses, Respondent *might* violate the antitrust laws and injure Petitioner in those businesses.

The cases are legion that merely entertaining a thought of, or making an exploration about, the possibilities of entering a business, without implementing such thought or exploration, is not sufficient to support an action under the antitrust laws. *Triangle Conduit & Cable Co., Inc.* v. *National Electric Products Corporation*, 152 F. 2d 398 (C.A. 3, 1945); *Pastor* v. *American Telephone and Telegraph Co.*, 76 F. Supp. 781 (S.D. N.Y., 1940); *Stearns* v. *Tinker & Rasor*, 252 F. 2d 589 (C.A. 9, 1957); *Peller* v. *International Boxing Club, Inc.*, 227 F. 2d 593 (C.A. 7, 1955); *Image and Sound Service Corp.* v. *Altec Service Corp.*, 148 F. Supp. 237 (D. Mass., 1956); *Broadcasters Inc.* v. *Morristown Broadcasting Corporation*, 185 F. Supp. 641 (D.N.J., 1960); *Nachman* v. *Shell Oil Co., Inc.*, CCH 1944-1945 Trade Cases, Par. 57,361 (D. Md., 1945).

The cases cited by Petitioner Volasco, at page 55 of the Petition, refute its contention and support the decision of the Court below. Thus, in *Pennsylvania Sugar Refining Co.* v. *American Sugar Refining Co.*, 166 F. 254 (C.C.A. 2, 1908), the plaintiff had spent "millions of dollars", "had erected a new enlarged sugar refinery upon its premises in Pennsylvania, and was prepared and intended to resume and continue the business which it had be-

fore carried on", except for defendant's gaining control of plaintiff's directors and causing them to vote against its engaging in its business. In *William Goldman Theatres, Inc.* v. *Loew's Inc.*, 69 F. Supp. 103 (E.D. Pa., 1946), aff'd 164 F. 2d 1021 (C.C.A. 3, 1948), cert. den., 334 U. S. 811 (1948), the plaintiff owned and operated a theatre and possessed all the means required to engage in the business of exhibiting films, except that it had been wrongfully precluded by the defendant who controlled the distribution of such films from obtaining them. Similarly, in *American Federation of Tobacco Growers* v. *Neal*, 183 F. 2d 869 (C.A. 4, 1950), plaintiff owned a tobacco warehouse and possessed all the means of engaging in the business of holding auctions in that warehouse, except that defendant warehousemen, who through their trade association controlled the allotment of auction time essential to the conduct of plaintiff's business, refused to allocate any auction time to the plaintiff thereby effectively preventing it from conducting its business. On the other hand, in *Triangle Conduit & Cable Co., Inc.* v. *National Electric Products Corporation*, 152 F. 2d 398 (C.A. 3, 1945), it was held that a plaintiff could not recover for its allegedly inability to make a certain product for *sale to others* where plaintiff's one machine had a "production capacity barely sufficient to supply plaintiff's own needs, so that one or more duplications of the machine would be necessary in order to supply the trade." In *American Banana Co.* v. *United Fruit Co.*, 166 F. 261 (C.C.A. 2, 1908), the defendant was engaged in the business of *growing* bananas, but the court held that because of its lack of preparedness to engage in the business of *buying and selling* bananas of other growers it was precluded from recovering any alleged damages for "injury" thereto.

Thus, in each of three cases (*Pennsylvania Sugar* case, *Goldman Theatres* case, and *American Federation of Tobacco Growers* case) cited by Petitioner where recovery was allowed, the plaintiff possessed all the means necessary to engage in the business except *one*, which was controlled by defendant and wrongfully denied by it to plaintiff. In each of the remaining two cases cited by Petitioner (*Triangle Conduit* case and *American Banana* case), the contrary result obtained because, the plaintiff did not possess the requisite capacity and there was no showing that its acquisition thereof was controlled by defendant and denied by it to plaintiff.

Thus, in this case, where Respondent exercised no control whatsoever over the acquisition by Petitioner of the readily available machinery necessary to manufacture asphalt shingles and roll roofing, the Courts below, in following established precedents, were correct in holding that Petitioner could not recover for alleged loss of profits on these products which it could not manufacture simply because it voluntarily chose not to acquire such machinery.

IV.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT IN REJECTING VOLASCO'S "MATURE YEAR" THEORY AS SPECULATIVE.

Under its "mature year" theory, Volasco seeks to ignore the damages it claimed to have sustained during the 2½ years of its existence before the filing of the Complaint, when the acts allegedly in violation of the law were committed, and attempts to substitute therefor projected hypothetical losses of profits it claimed it would have earned when it became a "mature" company in some abstract unspecified 2½ year period between 1960

and 2005 A.D., the date of the expiration of a lease covering a portion of the premises it occupied. (R. 965-81)

Citing as its authority *Lawlor* v. *Loewe*, 235 U.S. 522 (1915) and *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d. 846 (C.A. 8, 1952), Volasco questions the decision of the Court of Appeals affirming the Trial Court's rejection of plaintiff's "mature year" concept of damages. But neither of these cases stands for the proposition that the damage period may be transposed from that period when damages were allegedly sustained to some abstract unspecified time *in futuro*, the theory advanced by Volasco.

In *Brookside*, actual profits earned by one of the defendants to whom plaintiff was forced to sell its leasehold *before* the complaint was filed were held properly to be considered in determining the value of the loss of that leasehold even though part of the term had not expired when the complaint was filed but had expired at the time of trial. In *Lawlor*, it was merely held that damages which were the *direct* consequence of the acts committed before the filing of the complaint were recoverable, this being the rule specifically adopted by the Court of Appeals in this case.

Volasco's desire to have its damages calculated as if they took place during an unspecified hypothetical future period, rather than during the period preceding the filing of the Complaint, has no support in the cases and by its very nature is so speculative and uncertain that it can only be characterized as an absurdity. The Courts below in holding that such evidence was indeed speculative, indefinite, conjectural and inadmissible were manifestly correct.

V.

THE COURT OF APPEALS FOLLOWED ESTABLISHED PRECEDENTS AND WAS CORRECT IN HOLDING THAT IT WAS ERROR TO SUBMIT TO THE JURY THE ISSUE WHETHER RESPONDENT ALONE HAD MONOPOLIZED TRADE.

It may be set forth as a categorical absolute that there is no evidence in the record in this case upon which a finding of monopolization by Respondent *alone* may be predicated. Respondent specifically moved to take this issue from the jury, but this motion was denied. (R. 1575-1580, 2183-2186) The Court of Appeals held that since this issue should not have been submitted, the Trial Court erred. Petitioner Volasco attempts to becloud this inescapably valid conclusion by asserting that the Court of Appeals noted that although Respondent is the largest manufacturer of asphalt-saturated felt, it is not the largest manufacturer which produces asphalt-saturated felt. Petitioner points out that the relative net assets of Respondent's competitors does not appear in the record. This contention accentuates the fact that Petitioner has totally abdicated its burden of proving those necessary economic facts which are a prerequisite to a determination that a defendant has monopolized trade, for determination of monopoly power may not be made in a vacuum.

Petitioner adverts to the amount of Respondent's total assets and then "submit[s] that [Respondent's] size . . . is sufficient to carry with it an opportunity for abuse that is not to be ignored when the opportunity is proven to have been utilized in the past," citing *United States* v. *Swift & Company*, 286 U.S. 106 (1932). But the *Swift* case did not involve the criteria for a *violation* of the antitrust laws. Involved was an application by Swift for modification of a consent judgment. This Court

did no more than decide that, because of Swift's size *and its previous violation* of the antitrust laws, *the relief requested* would not be granted. Nowhere does it appear that a violation of law can be established merely by virtue of size. This Court has specifically stated the contrary. *United States* v. *United States Steel Corporation,* 251 U.S. 417, 451 (1920). The issue submitted to the jury in this case was whether Respondent monopolized trade in felt within a 200 mile radius of Knoxville. It was therefore incumbent upon Petitioner to prove that Respondent possessed monopoly power in that area. Essential to a determination of whether monopoly power exists is knowledge of defendant's position in the *relevant market area. United States* v. *E. I. Du Pont De Nemours & Co.,* 351 U.S. 377 (1956); *United States* v. *Columbia Steel Company,* 334 U.S. 495 (1948); *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295 (D. Mass., 1953), aff'd *per curiam,* 347 U.S. 521 (1954); and *United States* v. *Aluminum Company of America,* 148 F. 2d 416 (C.C.A. 2, 1945).

Volasco's proof on this subject was hopelessly defective. Nowhere in the record is there any evidence of Respondent's, or any other manufacturer's, share of sales of asphalt-saturated felt in the relevant market area, and this defect alone would justify the decision of the Court of Appeals.

The evidence, moreover, reveals that in 1955, Respondent manufactured and sold approximately 13% of the national production of felt, and that its percentage of sales subsequently decreased so that in 1958 its *national* share of production was 12½%. (Exhs. 174-6, 146-9; R. 157) The record does not even contain the barest indication that these national figures are applicable in the relevant or any other market area. That one's market

share may vary from area to area is too well known to require argument.

However, even if it be assumed, *arguendo*, that Respondent's share of the market in the relevant area approximated its share of the national market, Volasco's proof, nevertheless, remains fatally defective, for 12½% of a market falls far short of monopoly power. In discussing monopoly power, Judge Learned Hand in the *Aluminum* case, *supra*, at p. 424, stated:

> "... [ninety percent of the total market for a product] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and *certainly thirty-three percent is not.*" (emphasis added).

All the more certain is it that 12½% falls far short of this long standing requirement, especially when cast against the background of the fact that Respondent's seven largest competitors (The Ruberoid Company, Certain-teed Products Corp., Johns-Manville Corp., The Flintkote Co., Philip Carey Manufacturing Co., Allied Chemical Co. (Barrett Brand) and Bird & Son (R. 556-8)) share over 56% of the national market, the three largest of which account for an aggregate of 30% of the market and the remaining four of which account for approximately 25% of the market. (R. 1582)

As stated by this Court in *United States* v. *E. I. Du Pont De Nemours & Co.*, 28, 351 U.S. 377, 392 (1956), "If a large number of buyers and sellers deal freely in a standardized product, such as salt or wheat, we have complete and pure competition."

The evidence in this case clearly and uncontrovertedly reveals that felt is a fungible article, the product of one manufacturer being indistinguishable from that of any of the other numerous manufacturers, large or small.

That the industry is also characterized by ease of entry is evidenced by Petitioner's entrance into the business with no prior experience and a stockholders investment of about $60,000. Moreover, all disinterested witnesses testifying on the subject described competition in the industry as keen and vigorous (R. 1588-94, 1631-2, 1650-1, 1656-7, 1674-5, 1735-6, 1753, 1765, 1771-2, 1954-1956, 2119, 2131-2).

While the record contains no figures as to Respondent's or any competitor's market share in the local area, it does reveal that Respondent's sales from its plants serving the relevant area decreased 13% from 1955 to 1958, and this decrease was greater than the decrease in Respondent's *national* sales of felt which dropped 11.3% during the same period. Hence, to the extent that the record may be said to reveal any evidence of Respondent's sales, market share, and alleged monopoly power it clearly reveals the lack thereof. This Court in *United States* v. *E. I. Du Pont De Nemours & Co.*, 351 U.S. 377 (1956), defined the elements which a plaintiff must prove to sustain a charge of monopolization. These are the existence of monopoly power (the power to control prices or exclude competition at will) and the intent to acquire, maintain or exercise that power. Thus, as stated in that case, at p. 392:

> "Price and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa."

Far from showing that Respondent is capable of raising prices without regard to its competition, the record, if it makes anything clear, demonstrates Respondent's inability to raise prices or exclude competition.

The general pattern of Respondent's price changes in the relevant area during the period in question exemplifies the antithesis of monopoly power. Between the time during

which Volasco entered the roofing business and the date the Complaint was filed, Respondent changed its prices in the relevant area on sixteen occasions[13] (Exhs. 30, 31, 35-58). An analysis of these sixteen price changes (as they affected the price of felt in Knoxville) reveals that on six occasions Respondent raised its price, on seven occasions it reduced its price, and on three occasions its Knoxville price was unaffected. Moreover, these changes were highly variegated, increases and decreases being interspersed one between the other. This history of prices, far from indicating that Respondent controlled the market, rather reveals that Respondent was buffeted by a wide variety of competitive forces to which it had to either respond or lose more business that it did during the generally downward trend of prices during the period. That Respondent lacked the power to control prices is eloquently illustrated, for example, by its abortive attempt to raise prices on January 27, 1958 (less than three months before the Complaint herein was filed), only to have to reduce them retroactively, on February 14, in order to meet competition, a fact understandably omitted from the Petition's schedule of prices appearing on page 25 thereof. (R. 1975-2009; Exhs. 54-58, 117, 118, 433)

In the Volasco area, Respondent competed with no less than 14 companies in addition to Petitioner; and, contrary to Petitioner's assertion that Respondent's prices drove the Ohio Paper Company out of that market, docu-

[13] Petitioner's price chart, at p. 25 of the Petition, omits Respondent's abortive attempt to raise prices in January 1958, rescinded in February 1958 to meet competition; and the price change of August 1957 retroactive to July 1957 to meet competition did not affect Knoxville, but affected a portion of Volasco's area in and surrounding Chattanooga. Moreover, the statement in the Petition, at p. 63, that Respondent initiated all price increases and all but three price decreases is not supported by the record.

mentary evidence reveals sales by that company in the relevant area long after its alleged withdrawal. (R. 1476; 1824) In any event, Ohio's president who testified to his company's claimed withdrawal did not attribute it to Fry's prices but testified that he withdrew from the market before a price change he did attribute to Fry. (R. 1474)

Confronted with a record completely devoid of evidence of monopoly power and actually revealing no such power in Respondent, Petitioner adverts to the testimony of his witness, Mr. Cox, who stated that he heard Mr. Fry Sr. use the term "conditioning the market". Petitioner translates this phrase to mean the lowering of a price in a competitor's area in order to facilitate the purchase of the competitor's plant.

The fact is and the record reveals that Mr. Fry, Sr. and Mr. Fry, Jr., at the specific invitation of the owners of the plants in Albuquerque, Atlanta and Lubbock, who presumably were considering a sale of these plants, visited such plants and without in any way negotiating for their purchase informed the owners they were not interested in acquiring them. (R. 1026-30, 2060)

Mr. Cox did not say that Mr. Fry, Sr. conditioned or said he conditioned the Albuquerque or any other market, and Mr. Cox did not contend that the decision to offer his plant for sale was in any way motivated by anything Fry did. Nor did he contend that his profits were in any way impaired. Insofar as the plants at Atlanta and Lubbock are concerned, the record is completely barren of any reason why its owners apparently were considering their sale, the only evidence as to these plants being Mr. Fry, Jr's. testimony that he visited them at the request of the owners. (R. 2060)

If prices were low in the Albuquerque or Lubbock areas, which were served by a different Fry plant than served

the Knoxville area, the record certainly shows that the low prices had no competitive effect, for it reveals as many and as large competitors in those areas as in the Volasco area. In any event that a price is lower in one area than in another cannot be equated with proof of monopolization. For the same reason, Petitioner's reference to Respondent's higher prices in Chicago which was served by still a different plant has no probative value. (Petition, at p. 25)

To show monopoly power in either of these areas would require knowledge of the very economic factors which are lacking in this record with respect to the market in question.

Thus, the record in this case is totally devoid of any showing of the sales or market position of Respondent, or the sales and market position of any of its many competitors which are engaged in the manufacture of felt in the relevant market area; or any other economic factors which are necessary to a determination of monopolization. To the extent that economic factors are contained in the record, they show a *decrease* in Respondent's sales and market position during the complaint period. The holding of the Court of Appeals, based on long standing authority, is, therefore, clearly correct.

VI.

THE COURT OF APPEALS, FOLLOWING ESTABLISHED PRECEDENTS, CORRECTLY APPLIED FEDERAL LAW, RATHER THAN CONFLICTING TENNESSEE LAW, TO THIS CASE.

The established rule which has been uniformly applied in federal litigation going as far back as the 1884 decision in *Maryland* v. *Baldwin*, 112 U.S. 490 (1884), is that where, as here, a general verdict is returned as to a

multiplicity of issues and one of the issues was improperly submitted, the entire verdict must be set aside. The rationale of this rule is the simple proposition that it is impossible under such circumstances for an appellate court to determine whether or not the jury based its verdict on the defective issue. *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60 (1907); *Atlantic Coast Line Ry. Co.* v. *Tiller*, 142 F. 2d 718 (C.C.A. 4, 1944), rev'd on other grounds 323 U.S. 574 (1944); *Baltimore & O. R. Co.* v. *Reeves*, 10 F. 2d 329 (C.C.A. 6, 1926) and *Patton* v. *Wells*, 121 F. 337 (C.C.A. 8, 1903); *Erie R. Co.* v. *Gallagher*, 255 F. 814 (C.C.A. 2, 1918); *Baltimore & O. R. Co.* v. *Deneen*, 161 F.2d 674 (C.C.A. 4, 1947); *Roth* v. *Swanson*, 145 F. 2d 262 (C.C.A. 8, 1944); *Chicago, St. P., M. & O. Ry. Co.* v. *Krdoff*, 217 F. 525 (C.C.A. 8, 1914); *Firemen's Fund Ins. Co.* v. *M'Greevey*, 118 F. 415 (C.C.A. 8, 1902); and *Stokes* v. *United States*, 264 F. 18 (C.C.A. 8, 1920).

The cases cited by Volasco in support of its contention that there is a conflict between the Circuits as to the applicability of this rule to the case at bar fall into three categories: (a) *Diversity* cases decided prior to *Erie* v. *Tompkins* in which the federal courts uniformly applied federal law under the doctrine of *Swift* v. *Tyson* and rejected the so-called two-issue rule which permits a general verdict to stand even where one or more of a multiplicity of issues was improperly submitted to the jury; (b) *Diversity* cases decided after *Erie* in which the federal courts uniformly followed the state law and applied the two-issue rule in those few states which follow it, and (c) Cases decided under *federal statutes* creating rights which may be enforced in both federal and state tribunals in which it has been uniformly held that local law cannot be applied if its application would affect the substantial rights of the litigants.

Volasco does not contest the fact that *Atlantic Coast Line Ry. Co.* v. *Tiller*, 142 F. 2d 718 (C.C.A. 4, 1944), rev'd on other grounds 323 U.S. 574 (1944); *Roth* v. *Swanson*, 145 F. 2d 262 (C.C.A. 8, 1944); *Chicago & N. W. Ry. Co.* v. *Garwood*, 167 F. 2d 848 (C.C.A. 8, 1948), and other cases relied upon by the Court of Appeals hold that the so-called two-issue rule is inapplicable under federal law, but contends Tennessee, rather than Federal, law governs and that the decision of the Court of Appeals in rejecting this contention is in conflict with the decisions of other federal courts.

It is too well known to require further discussion that the case of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), overruled the decision in the case of *Swift* v. *Tyson*, 16 Pet. (U.S.) 1, 10 L.Ed. 865 (1842) and held that in diversity of citizenship cases, the federal courts are in effect an adjunct of the State court system, and federal law is not to be applied if the application of such law, as opposed to state law, would produce a variation in the outcome of litigation.

While Respondent feels no compulsion to exercise any erudition concerning the history and effect of the *Erie* case, it believes it is proper to note that *Wilmington Star Mining Co.* v. *Fulton*,[11] 205 U.S. 60 (1907) and *Baltimore & O. R. Co.* v. *Reeves*, 10 F. 2d 329 (C.C.A. 6, 1926), cited by Volasco to support its contention that there is

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[11] This Court in the **Wilmington** case held that the "two-issue" rule was inapplicable under the authority of **Maryland v. Baldwin, supra**, and merely observed that the same result would have attained under an Illinois statute as construed by the appellate courts of that State. The assertion in the Petition (p. 75) that the Court in **Wilmington** "construed" an Illinois statute and two Illinois cases as "the basis for its decision" in this **pre-Erie** case, therefore, is inaccurate and misleading.

a conflict between the decisions of the Courts of Appeal, were *diversity* cases decided prior to the *Erie* case in which the federal courts followed federal law and rejected the so-called two-issue rule, while the following cases cited by Volasco in its spurious attempt to set forth a non-existent conflict of decisions were *diversity* cases decided subsequent to the *Erie* case in which the respective federal courts applied state law under the *Erie* doctrine. *Louisville & Nashville Railroad Company* v. *Rochelle,* 252 F. 2d 730 (C.A. 6, 1958); *Atlantic Coastline Railroad Company* v. *Smith,* 264 F. 2d 428 (C.A. 6, 1958); *Tracy* v. *The Finn Equipment Co.,* 290 F. 2d 498 (C.A. 6, 1961); *Stephenson* v. *Grand Trunk Western R. Co.,* 110 F. 2d 401 (C.C.A. 7, 1940); *Roth* v. *Swanson,*[15] 145 F. 2d 262 (C.C.A. 8, 1944).

In *concurrent jurisdiction cases,* it has been held by this Court that federal statutes are to be uniformly applied in state as well as federal courts, so that the federally created rights of litigants will not depend upon variations in state law. *Dice* v. *Akron, Canton & Youngstown Railroad Company,* 342 U.S. 359 (1952) (an action maintained under Federal Employers Liability Act in the State of Ohio, held, issue of fraud to be triable before a jury and not before a court, notwithstanding the fact that state law required the court rather than the jury to determine all issues of fact concerning questions of fraud); *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239 (1942) (an action maintained under the Jones Act, held, burden of proving validity of release must be sustained by de-

[15] In this **post-Erie** case the court clearly recognized its obligation to follow state law under the Erie doctrine if the application of Federal law would change the result of the litigation. State law (Minnesota) governing the **Roth** case and Federal law both reject the two-issue rule.

fendant under federal law and not by party seeking to attack validity of release under state law). These last cited cases explicitly held that in areas where substantial rights of the litigants are involved in actions based on federally created rights, federal rather than state law is to be applied in order that the rights of all litigants regardless of their geographic location may be adjudicated uniformly.

Nor is the law concerned with labels or tags such as procedural or substantive by which petitioners seek to distinguish cases. The controlling test is whether or not the action under review might have a different result depending upon which law is applied. *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945).

An examination of *all* cases cited by Volasco and *all* cases relied upon by the Court of Appeals, after giving effect to the change in law arising out of the *Erie* case, patently reveals that they are consistent with one another. That is, prior to the *Erie* case, federal courts in *diversity* cases followed federal law which requires the reversal of a judgment based upon a verdict where one of a number of issues was improperly submitted to the jury. In *diversity* cases subsequent to the *Erie* case, federal courts follow state law where to do otherwise would substantially affect the rights of litigants, and accordingly follow the two-issue rule where the rule obtains in the local forum.

In *concurrent jurisdiction* cases prior and subsequent to *Erie*, in which federally created rights are adjudicated both in federal and state courts, the courts were and are required to follow federal law in matters substantially affecting the rights of litigants. Thus, in *Atlantic Coastline Ry. Co.* v. *Tiller*, *supra*, the Court of Appeals for the

Fourth Circuit refused to apply a state two-issue rule in an action maintained under two concurrent jurisdiction statutes—the Federal Employers Liability Act and the Federal Boiler Inspection Act.

In cases brought under the Sherman and Clayton Acts federal law applies. See *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942); *Wentling* v. *Popular Science Publishing Company*, 176 F. Supp. 652 (M.D. Pa., 1959).

The other cases cited by Volasco neither involve a question of the applicability of the two-issue rule to the adjudication of federally created rights, the improper submission of an issue to the jury nor in any way support its contention.

Atlantic Coastline R. Co. v. *Dixon*, 207 F. 2d 899 (C.A. 5, 1953) involves the admissibility of evidence in a Federal Employers Liability Act case in which it was held that evidence specifically admissible under state law must be received in a Federal Court under the express provision of Rule 43(a) of the Federal Rules of Civil Procedure.

In *Gulf Refining Co.* v. *Fetschan*, 130 F. 2d 129 (C.C.A. 6, 1942) the Court, following Rule 49 (b), affirmed a general verdict notwithstanding the failure of the jury to answer certain interrogatories where the interrogatory answered was consistent with the general verdict and regardless of the way the jury might have answered the ~~necessary~~ interrogatories, the result would be the same. There was no question of the improper submission of an issue to the jury.

In *Foster* v. *Moore-McCormack Lines, Inc.*, 131 F. 2d 907 (C.C.A. 2, 1942), cert. den. 318 U.S. 762 (1943), the Court found sufficient evidence in the record to support

plaintiff's contention that an injury aggravated a previously existing arthritic condition and commented that, if defendant desired to know whether the jury had properly weighed that evidence in the light of its evidence to the contrary, it might have requested special interrogatories.

Filipek v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734 (C.A. 2, 1958), cited at page 79 of the Petition, stands only for the proposition that where a party fails to object to an interrogatory at the time of its submission it will not be heard to complain as to the propriety of such interrogatory on appeal. This case is not even remotely concerned with the proposition for which it is cited. *Bank of America National Trust and Savings Association* v. *Hayden*, 231 F. 2d 595 (C.A. 9, 1956) merely holds that in a case where the plaintiff claimed a single sum of money on three alternative theories, all of which were properly submitted to the jury, a general verdict will not be disturbed.

That counsel for Volasco failed to recognize the inapplicability of the two-issue rule to a cause of action based upon a federally created right (apparently being apprised of this limitation only with the rendition by the Court of Appeals of its opinion in the *Finn* case, *supra*) should not operate to penalize Respondent or so change a basic principle of federal jurisdiction. Nor should Volasco so cavalierly and carelessly urge as it does in its Petition that this Court follow the language found in decisions on points not relevant here.

In conclusion, the Court of Appeals correctly decided the case at bar in accordance with a well-established principle of federal law applicable to a matter involving rights and obligations created solely by federal statute

to be administered solely in federal courts. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). Its decision does not present any conflict with decided cases. Petitioner's contention would permit the administration of both the Sherman Act and the Clayton Act to vary in effect and enforcement from one state to another. That the enforcement of such legislation should not be dependent upon the vicissitudes and variations of local law is self-evident.

VII.

THE COURT OF APPEALS FOLLOWED ESTABLISHED PRECEDENTS AND CORRECTLY HELD THAT PETITIONER VOLUNTEER, AS A MERE SUPPLIER OF A RAW MATERIAL TO VOLASCO, IS TOO REMOTE TO RECOVER DAMAGES UNDER THE ANTITRUST LAWS.

Although Petitioner Volunteer admits that it has generally been held under the antitrust laws that a "supplier of products to one who is the direct target of antitrust violations is too far removed or too remote to recover from those guilty of the violations" (Petition, at p. 81), it argues that the reasoning of the cases which enunciate this rule is "not sound" and that such cases are in conflict with *Congress Building Corporation* v. *Loew's, Incorporated*, 246 F. 2d 587 (C.A. 7, 1957) and *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E.D. Pa., 1953), affd. 211 F. 2d 405 (C.A. 3, 1954), cert. den. 348 U.S. 828 (1954).

Volunteer's claim for status as a plaintiff in its action against Respondent is not grounded on any alleged illegal prices applied to goods manufactured or sold by Volunteer or to goods competitive therewith. The sole ground for Volunteer's claim is that it "has been deprived of its profits on sales of a large volume of asphalt to the plain-

tiff Volasco Products Company." Complaint, Paragraph 8. In other words, Volunteer maintains that as a consequence of Volasco's alleged injury Volunteer did not sell to Volasco a greater volume of raw material, thus depriving Volunteer of anticipated profits thereon. This claim, based upon consequential injury allegedly incurred by a supplier, has consistently been held to be too remote to be the subject of a suit under the antitrust laws.

As admitted by Volunteer, and as stated by the Court of Appeals for the Ninth Circuit in *Conference of Studio Unions* v. *Loew's Inc.*, 193 F. 2d 51 (C.A. 9, 1951), cert. den. 342 U.S. 919 (1952): "Recovery and damages under the antitrust law is available to those who have been *directly* injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm." (Emphasis added.)

In the case of *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass., 1956), a contention almost identical to that of Volunteer was rejected. In *Snow Crest*, the manufacturer of the finished product was a bottler of syrup. The supplier in that case was in the business of manufacturing and selling extracts which were used as a major ingredient in the manufacture of the bottled syrup. Like Volunteer, it was a supplier of a raw material used in the product against which violations of the antitrust law were alleged to bear. The material facts in the *Snow Crest* case parallel those in the case at bar with respect to business and product relationships, level of competition, type of injury sustained by the supplier, and even with respect to identity of shareholders in the manufacturer and supplier corporations. In holding that the supplier corporation had no standing to sue under the antitrust laws, the court in the *Snow Crest* case stated, at page 909, that:

"It is well settled that despite its broad language, § 4 of The Clayton Act does not give a private cause of action to a person whose losses result only from an interpretation or diminution of profitable relationships with the party directly affected by alleged violations of the antitrust laws."

Accord: *Productive Inventions, Inc.* v. *Trico Products Corporation,* 224 F. 2d 678 (C.A. 2, 1955), cert. den. 350 U.S. 936 (1956); *Martens* v. *Barrett,* 245 F. 2d 844 (C.A. 5, 1957); *Peter* v. *Western Newspaper Union,* 200 F. 2d 867 (C.A. 5, 1953); *Walder* v. *Paramount Publix Corporation,* 132 F. Supp. 912 (S.D.N.Y., 1955); *Gerli* v. *Silk Ass'n. of America,* 36 F. 2d 959 (S.D.N.Y., 1929); *Corey* v. *Boston Ice Co.,* 207 F. 465 (D. Mass., 1913); *Loeb* v. *Eastman Kodak Co.,* 183 F. 704 (C.C.A. 3, 1910); *Melrose Realty Co., Inc.* v. *Loew's, Incorporated,* 234 F. 2d 518 (C.A. 3, 1956), cert. den. 352 U.S. 890 (1956); *Harrison* v. *Paramount Pictures, Inc.,* 115 F. Supp. 312 (E.D. Pa., 1953), aff'd. 211 F. 2d 405 (C.A. 3, 1954), cert. den. 348 U.S. 828 (1954).

The basis for the above rule that mere suppliers can not recover treble damages for consequential injuries is that if the rule were otherwise there would be an unjustifiable proliferation of plaintiffs if suppliers of a party allegedly injured by the antitrust law were all given causes of action against the alleged wrongdoer. As applied to the case at bar, if Volasco's sales declined as a result of the alleged violation of the antitrust laws, it undoubtedly would have purchased fewer letterheads and office supplies, and consumed less electricity, gas, oil, etc. *ad infinitum.* Nobody would seriously contend that every company which had been selling its products to Volasco, or performing services for Volasco, and whose profitable relationship with that company might have been indirectly

impaired by reason of Volasco's injury, has standing to sue under the antitrust laws. To prevent such an extreme and speculative result, with possibilities of a nearly infinite number of claims and lawsuits, the courts have allowed only a party directly injured to maintain an action.

The two cases relied upon by Volunteer as manifesting a so-called departure from the above mentioned well-established rule are *Congress Building Corporation* v. *Locw's, Incorporated*, 246 F. 2d 587 (C.A. 7, 1957) and *Karseal Corporation* v. *Richfield Oil Corporation*, 221 F. 2d 358 (C.A. 9, 1955). Both of these cases are, however, clearly distinguishable from Volunteer's claim against Fry. In the *Congress Building* case, the plaintiff was a non-operating owner-lessor of a motion picture theatre who contracted with the operating-lessee for a minimum fixed rent plus a percentage of the theatre's gross receipts. The lessor was, in fact, a co-venturer with the operator-lessee, and thus was, pro rata, a party directly injured by the restraint in trade which reduced the box office receipts of the theatre. Not only is the holding in the *Congress Building* case consistent with other cases which hold that a landlord of a theatre is too remote to recover damages where the lease agreement calls for a fixed rent, but, even more important, the operating-lessee of the theatre in the *Congress Building* case who ordinarily would be the proper claimant was shown to have been a party to the very conspiracy to which complaint was made, so that unless the landlord was allowed to sue, the conspirators would have been permitted to retain the fruits of their conspiracy.[16]

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[16] The case of **Harrison v. Paramount Pictures, Inc.**, 115 F. Supp. 312 (E.D. Pa. 1953), affd. 211 F. 2d 405 (C.A. 3, 1954), cert. den. 348 U.S. 828 (1954), noted by Petitioner, was not "overruled" in the **Congress Building** case. Moreover, the lessee's participation in the **Harrison** case was not clear, whereas, in the **Congress Building** case, the participation of the lessee in the conspiracy was readily apparent.

Likewise, the *Karseal* case is also distinguishable from the instant matter. In the *Karseal* case, the defendant required its service station customers to refrain from purchasing automobile polish made by manufacturers other than those designated by it. This requirement deprived plaintiff's distributors of customers for plaintiff's finished product. The Court accordingly found that the target area of the violation was automobile polish in its complete and packaged form, that is, the form in which plaintiff sold it to its distributors. Thus, the plaintiff there was not a supplier of raw materials, but rather a party *directly* affected by the restraint in trade. The Court in that case clearly recognized this distinguishing factor, and stated that "the restraint was directed against the particular products, in their finished form (including Karseal's wax), described in the findings, conclusion and decree in the *Richfield* case, and not against raw materials or component parts of the products".

As demonstrated above, Petitioner's attempt to create an artificial conflict in decision does not withstand analysis. The cases in this area of the law uniformly, and with well-grounded justification, refuse to permit the numerous and various suppliers of raw materials to a manufacturer of a finished product to recover for any alleged "injury" sustained because of the manufacturer's alleged decrease in production. The decision of the Court of Appeals on this point of law is, therefore, well supported in both reason and authority.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals was correct and in accordance with established precedents, and that, therefore, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

EXHIBIT 197.